SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 170.

THE UNITED STATES AND THE KIOWA INDIANS, APPELLANTS,

vs.

JUAN B. MARTINEZ, ADMINISTRATOR OF JULIO MARTINEZ, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

JUAN B. MARTINEZ, ADMINISTRATOR OF JULIO Martinez, deceased,
vs.
THE UNITED STATES AND THE UTE INDIANS. } No. 5283. Indian Depredation.

I. *Petition. Filed October 24, 1891.*

To the Honorable the Chief Justice and Judges of the United States Court of Claims:

I.

Your petitioner, Juan B. Martinez, administrator as aforesaid, respectfully represents that he is a citizen of the United States, and resident of the county of Mora, in the Territory of New Mexico.

II.

Your petitioner further states that Julio Martinez, deceased, was the owner of the following-described property, which was taken or destroyed without just cause or provocation on the part of the owner or agent in charge thereof, on or about the month of June, A. D. 1873, in the Territory of New Mexico, by the Ute Indians, in amity with the United States, to wit, 700 head of sheep of the value of $2 each, $1,400, and the same has not been returned or paid for.

III.

Your petitioner further states that the said United States has supervisory charge of the said tribe of Indians, and is justly indebted to your petitioner in the sum of $1,400, the value of said property when taken or destroyed or used as aforesaid by the said Ute Indians, after allowing all just offsets and counterclaims.

2 IV.

Your petitioner therefore prays that in accordance with the provisions of the act approved March 3d, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," a judgment may be granted in favor of your petitioner by this honorable court for the amount claimed herein and for such other or further relief as your petitioner may be entitled to in the premises.

JUAN B. MARTINEZ,
Administrator, etc.,
By WM. B. MATTHEWS,
His Attorney.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Wm. B. Matthews, being first duly sworn, says that he is attorney of the petitioner, who is absent from the city; that no assignment of the

claim set forth in the above petition, or any part thereof, or any interest therein, has been made, except as in said petition stated; that the said petitioner is justly entitled to the amount herein claimed from the United States, after allowing all just offsets and counterclaims; and that all the facts stated in said petition are true to the best of his knowledge and belief.

WM. B. MATTHEWS.

Subscribed and sworn to before me this 24th day of October, A. D. 1891.

JOHN RANDOLPH, *Asst. Cl'k C. C.*

Claimant's address: Las Vegas, N. M.

WM. B. MATTHEWS,
Attorney for Claimant, 500 5th St., Washington, D. C.

General traverse. Filed February 5, 1901.

Now comes the Assistant Attorney-General and, answering the petition in the above-entitled cause, denies each and every allegation of fact contained therein, and asks judgment that the petition be dismissed.

JOHN G. THOMPSON,
Assistant Attorney-General.

3 III. *Motion for leave to file amended petition. Filed Nov. 4, 1902.*

In this cause comes the claimant by attorney, and representing and showing to the court that the original petition filed October 24, 1891, alleges that the depredation complained of was committed by the Ute Indians, and that the petition is in error in that statement, and that the depredation was committed by Indians of the Kiowa tribe, prays leave of the court to file the amended petition herewith tendered.

WILLIAM B. MATTHEWS,
Attorney for Claimant.

WILLIAM H. ROBESON,
Of Counsel.

This motion was allowed and thereupon the claimant filed the following amended petition, to wit:

4 IV. *Amended petition. Filed November 4, 1902.*

JUAN B. MARTINEZ, ADMINISTRATOR,
Julio Martinez, deceased,
vs.
THE UNITED STATES ET AL.
} Indian depredation No. 5283.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner, Juan B. Martinez, administrator of the estate of Julio Martinez, deceased, comes, and by leave of the court first had and obtained, files this his amended petition, and respectfully represents—

I. That he is a citizen of the United States, resident in Mora County, New Mexico, and the administrator of the estate of Julio Martinez,

deceased, in said county and Territory, who was at the time of the depredation hereinafter alleged also a citizen of the United States.

II. That the said Julio Martinez, deceased, was the owner of the following-described property, which was taken or destroyed in the month of June, 1873, in the Territory of New Mexico, by Indians of the Kiowa tribe, then in amity with the United States, to wit: 700 head of sheep of the value of $2 each, $1,400; that the said property was taken by the said Kiowa Indians without just cause or provocation upon the part of the owner or any of his agents in charge; that neither the owner nor his agents in charge sought private satisfaction or revenge, and that the said property has not been returned or paid for.

5 III. That the said Kiowa Indians and the United States are justly indebted to your petitioner, as the administrator of said estate of Julio Martinez, in said sum of $1,400, the value of said property when taken or destroyed as aforesaid.

IV. That your petitioner heretofore, to wit, at the December term, 1890, filed his original petition in which it is averred that the depredation was committed by the Ute Indians, but that since the filing of said petition it has developed that the Indians, by whom the depredation was committed, were the Kiowas, as now alleged.

Your petitioner therefore prays:

That in accordance with the provisions of the act approved March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations," a judgment be granted in favor of your petitioner by this honorable court against the Kiowa Indians and the United States for the amount claimed herein, and for such other and further relief as your petitioner may be entitled to in the premises.

(Signed) JUAN B. MARTINEZ,
By WM. H. ROBESON, *Attorney.*

(Signed) WM. B. MATTHEWS,
Attorney.

(Signed) WM. H. ROBESON,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

William H. Robeson, being first duly sworn, says that he is one of the attorneys for the petitioner who is absent from the city.

That the facts stated in the foregoing petition are true to the best of his knowledge, information, and belief, and that the petitioner is justly entitled to the amount therein claimed, there being no just offsets or counterclaims.

(Signed) WILLIAM H. ROBESON,
Attorney for Claimant.

Sworn to and subscribed before me this November 4, 1902.

[SEAL.] (Signed) L. M. FOX, *Notary Public.*

6 V. *Defendants' plea. Filed November 5, 1902.*

Now comes the Assistant Attorney-General, appearing in behalf of the United States and the Kiowa Indians, and, for plea to the amended declaration herein filed, says that the claimant ought not to have and

maintain his action against the Kiowa Indians for the reason that his claim is barred, no claim against the said Kiowa Indians having been presented to the court within three years after the passage of the act of March 3, 1891.

And this the defendants are ready to verify.

JOHN G. THOMPSON,
Assistant Attorney-General.

November 19, 1902, the defendants' plea in bar was overruled by the court.

And the case was thereupon submitted on the evidence and briefs.

VI. *Traverse of amended petition. Filed November 19, 1902.*

Now comes the Assistant Attorney-General, and, answering the amended petition in the above-entitled cause, denies each and every allegation of fact contained therein, and asks judgment that the petition be dismissed.

JOHN G. THOMPSON,
Assistant Attorney-General.

7 VII. *Findings of fact and conclusion of law. Filed December 1, 1902.*

JUAN MARTINEZ, ADMINISTRATOR OF THE estate of Julio Martinez, deceased, *v.* THE UNITED STATES AND THE KIOWA INDIANS.	No. 5283. Indian depredation.

This case having been heard by the Court of Claims on the amended petition, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

At the time of the depredation, hereinafter stated, the claimant's decedent was a citizen of the United States.

II.

In June, 1873, in Mora County, New Mexico, Indians belonging to the Kiowa tribe of Indians took and drove away property of the kind and character described in the petition, the property of claimant's decedent, which was reasonably worth the sum of $690.

Said property was taken, as aforesaid, without just cause or provocation on the part of the owner or the agent in charge, and has never been returned or paid for.

III.

At the time of said depredation the defendant Indians were in amity with the United States.

CONCLUSION OF LAW.

8 Upon the foregoing findings of fact, a majority of the court decides, as a conclusion of law, that the claimant recover judgment against the United States and the Kiowa Indians in the sum of six hundred and ninety dollars ($690.00).

It is ordered that out of the said judgment the sum of one hundred and three dollars ($103.00) be allowed and paid to William B. Matthews, claimant's attorney of record, in full for all services in this case.

The original petition against the Ute Indians is dismissed.

BY THE COURT.

9 VIII. *Judgment of the court.*

JUAN B. MARTINEZ, ADMINISTRATOR of Julio Martinez, deceased,
vs.
THE UNITED STATES AND THE KIOWA tribe or nation of Indians.
} Indian depredation, No. 5283.

At a Court of Claims held in the city of Washington on the first day of December, A. D. 1902, judgment was ordered to be entered up, as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, Juan B. Martinez, administrator of Julio Martinez, deceased, do have and recover of and from the United States and the Kiowa tribe or nation of Indians, committing the wrong for which this judgment is rendered, the sum of six hundred and ninety dollars ($690), of which sum there is allowed William B. Matthews, the claimant's attorney, for prosecuting said claim, the sum of one hundred and three dollars ($103), fixed by the court according to the provisions of the act of March 3, 1891, chapter 538, section 9 (1, Supplement of Revised Statutes, 2d edition, pages 915, 916).

BY THE COURT.

10 IX. *Application for and allowance of appeal.*

JUAN B. MARTINEZ, ADMINISTRATOR OF JULIO MARTINEZ, deceased,
vs.
THE UNITED STATES AND THE KIOWA INDIANS.

Now comes the Assistant Attorney-General and prays an appeal from the judgment of this court to the Supreme Court of the United States.

JOHN G. THOMPSON,
Assistant Attorney-General.

Filed December 4, 1902.

DECEMBER 4, 1902.

Ordered that the application of the defendants for an appeal to the Supreme Court of the United States in the above-entitled cause be allowed as prayed for.

BY THE COURT.

11 In the Court of Claims.

JUAN B. MARTINEZ, ADMINISTRATOR of Julio Martinez, deceased,
vs.
THE UNITED STATES ET AL.
} No. 5283. Ind. depredation.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I hereunto set my hand and affixed the seal of said Court of Claims this 15th day of December, A. D. 1902.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 18753. Court of Claims. Term No. 170. The United States and the Kiowa Indians, appellants, vs. Juan B. Martinez, administrator of Julio Martinez, deceased. Filed December 17th, 1902.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES AND KIOWA INDIANS, appellants,
v.
JUAN B. MARTINEZ, ADMINISTRATOR OF Julio Martinez, deceased.
} No. 170.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from the Court of Claims in an Indian depredation case brought in that court under the jurisdictional act entitled "An act to provide for the adjudication and payment of certain Indian depredation claims," approved March 3, 1891 (1 Supp. R. S., 2d ed., p. 913). That act provides:

> That all claims existing at the time of the taking effect of this act shall be presented to the court by petition as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred.

The claimant filed his claim in the court below within the statutory time, making the United States and the Ute tribe of Indians defendants. Subsequently, after the expiration of more than three years, he filed an amended petition by which the Kiowa tribe of Indians was substituted for the Ute tribe. The Court of Claims allowed the filing of the amended petition, overruled the defendants' plea in bar, and rendered judgment against the United States and the Kiowa tribe of Indians.

From this judgment the defendants appeal.

It is conceded that at the time when he filed his amended petition he could not have begun a new suit against the Kiowa Indians. It will also be conceded that there is no privity of interest nor any connection whatsoever between the Kiowa Indians and the Ute Indians. The sole question raised by the appeal is whether under the statute the court erred in permitting the Kiowa Indians to be substituted by amendment at a time when an original suit against them would have been barred by the statute.

AMENDMENTS UNDER THE STATUTE OF LIMITATIONS.

It is not permissible to bring in a new party defendant by an amendment after the statute of limitations has run in his favor. It has been held by this court that the substitution of a new party, or the introduction of an additional party as defendant in a suit, is equivalent to the beginning of

a new suit. When new parties are made by amending a bill in equity, it is held that the statute of limitations does not cease to run in their favor until they are cited in. In *Miller* v. *McIntyre* (6 Pet., 61), McLean, J., delivering the opinion of the court, said:

> It is insisted that the amended bill filed in 1815, by which the defendants were made parties to the bill, has relation to the commencement of the suit in 1808, and consequently that the statute can not bar, as its limitation had not then run.
>
> Until the defendants were made parties to the bill, the suit can not be considered as having been commenced as against them. It would be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice and where a final decree in the case would not have prejudiced their rights.

This case was cited with approval by Chief Justice Marshall in *Sicard's Lessee* v. *Davis* (6 Pet., 124). So, in a suit to enforce a mechanic's lien, where a new party defendant was brought into the case by an amendment to the petition after the expiration of the six months' limitation prescribed for the bringing of such suits, the supreme court of Illinois, in reversing the judgment of the court below, said:

> Appellant was brought into the case, after the lapse of more than two years, by an amendment to the petition. So far, then,

as he is concerned, there was no suit pending against him within the six months, but only from the time of the amendment. This can have no relation back to the time of commencing the suit against the original parties * * *. *Bringing him in at a time subsequent is in effect commencing a new suit against him at that time.*

Crowl v. *Nagle*, 86 Ill., 437.

See also to the same effect *Dunphy* v. *Riddle*, 86 Ill., 22; *Clark* v. *Manning*, 95 Ill., 508.

SUPPOSED HARDSHIPS DO NOT AFFECT LIMITATION.

Neither can a supposed hardship upon the claimant in this case affect the decision in regard to the running of the limitation provided by the statute.

Statutes of limitation are arbitrary in all their aspects and operations. Unless the statute makes an exception there can be none, however great may be the hardships that ensue. (*Jones* v. *Lemon*, 26 W. Va., 629; *Kendall* v. *United States*, 107 U. S., 123.) "The general rule is that the language of the act must prevail, and no reasons based upon apparent inconvenience or hardship can justify a departure from it." (Bradley, J., in *Amy* v. *Watertown*, 130 U. S., 320.)

The statutory provision which applies in this case is not identical with the ordinary statutes of limitation, but in this respect is stronger than such statutes, inasmuch as its prescription does not merely apply to the right of action on the claim, but declares the demand barred; so that the court

will interpose the statute in bar of a suit whether or not it is pleaded by counsel for the defendants. (*Kendall* v. *United States*, 14 C. Cls. R., 122.) But in other respects the proviso in the statute is in the same nature as the ordinary statute of limitation (although it begins to run from a time fixed by its own terms instead of the date when the demand accrued, and no disability of the claimant will suspend its operation against him) and is subject to the same rules of construction and application; and it follows from the decisions cited above that no argument which applies merely to the hardship, or supposed hardship, upon the claimant, which may be caused by the statute, can affect its application. It is said in the *Kendall case* (*supra*) that when claimants come to the Court of Claims—

> They come, subject, of course, to all the statutory terms prescribed by the law-making department of the Government, and there is no power in this court to admit them here as suitors on any other terms, nor to go beyond the line of jurisdiction laid down for it by the law, nor to remove or disregard any barrier which the legislature has erected, nor to interpose any that that body has not prescribed.

If, then, the substitution of a new party defendant by amendment is equivalent to the beginning of a new action against him, and if this is forbidden by the statute irrespective of any hardships which may ensue, authority for the judgment of

the court below must be found in some provision of the jurisdictional act which would except this from the general rule. Unfortunately, the court below did not write an opinion in this case and did not refer to any previous decision in overruling the defendants' plea. Presumably, however, the action was taken on the authority of *Duran's case.* (31 C. Cls. R., 353.) This is a case which, while differing in two respects, both of which are accorded some importance by the court in its opinion, raises the same general question that is involved in the case at bar.

THE DURAN CASE DISTINGUISHED.

The Duran case is distinguished from this in the fact that the joinder of the wrong tribe of Indians in that case was apparently an error on the part of the claimant's attorney, since the declaration and evidence in the same case, previously filed in the Interior Department, and available to the attorney, showed the right defendants throughout. Such mistakes the Court of Claims is disposed to correct wherever it is within its power; and the opinion cites the *Cowan Infants' case* (5 C. Cls. R., 107) and the *Thomas case* (15 C. Cls. R., 335.) In the case at bar there is no indication that a mere clerical mistake has been made, either by the claimant or his attorney. It is simply a case where a civil action has been commenced against a party who is shown by the evidence to have been innocent of any wrong to the plaintiff, and where there

is no action commenced against the real party implicated by the evidence.

Again, in the Duran case much was made by the court of the fact that the objection was not raised in time by the defendants, since if a plea of nonjoinder or misjoinder had been filed at the commencement of the litigation the claimant could have discontinued and brought an action against the right defendants. (Opinion in Duran case, 31 C. Cls. R., 355–356.) Whatever the merit of that argument in the Duran case, where evidence had been taken and filed in the Interior Department before the commencement of the action in the Court of Claims, it can have no possible application here. This is not a suit on contract where the United States as one defendant is presumed to know whether the right parties are joined as codefendants; it is primarily a suit against an Indian tribe for a certain act alleged to have been committed by some of its members in a remote region some eighteen years before the action was brought. The United States is joined only as guarantor, and the guarantee is one which arises, not out of complicity in the wrongdoing, nor out of contract with relation to the specific subject-matter of this suit, but out of a general law, indefinite in its application to individual instances, and applying equally to some hundreds of tribes and to acts committed throughout a long series of years. From the very nature of the case, it is one in which the facts were peculiarly within the

knowledge of the claimant; and the United States, having no actual knowledge of the occurrence, can not be charged with such knowledge. It would be absurd to say in this case that the defendants, the United States, were required to set up a plea of misjoinder "at the threshold of the litigation," or that the defendant Indians, the Ute tribe, did not fully meet the requirements of the case by pleading the general issue. Besides, the defense under the statute is made by the Kiowa Indians and not by the United States, and neither the Kiowa tribe nor the United States were ever apprised of the fact that the claimant would attempt recovery against that tribe until his evidence was filed; and this was long after the expiration of the time within which new actions could be commenced.

There is therefore no laches on the part of the defendants in the court below and no question of correcting a mere clerical mistake, apparent on the face of the papers; and in these respects this case is distinguished from the Duran case and should not be ruled by that decision.

It is to be presumed, however, in the absence of an opinion, that the court decided this case upon the remaining arguments of the Duran case; and these will now be considered.

I. THAT THE OBJECTION IS TECHNICAL.

The court calls the defense a technical one, because the Attorney-General, who is by the statute charged with the duty of defending the Indians as well as the United States in all cases,

was in court from the beginning of the litigation. It is also stated in the opinion that the Indians who are sought to be charged (in this case, the Kiowa tribe) have lost nothing by the delay, since their defense has been as effectively looked after as if they had been parties on the record. However gratifying this testimonial may be to the Attorney-General, it is conceivable that it might not meet with the full indorsement of the Kiowa Indian tribe, since they, as well as the Utes (who were charged in the original petition), had for many years employed an attorney to represent them in the defense of similar suits. What right has the court to say that the Indians who are to be charged with the judgment are not entitled to be made parties to the record and to be given an opportunity to defend by their own attorney, within the statutory time, because of an assumption that their interests would be effectively guarded by someone else? And the statement that "they have lost nothing by the delay," even if it be conceded to be true, would not be an answer to a plea of the statute of limitations in any other jurisdiction. This defense is always technical, but is not therefore any the less conclusive.

II. WHETHER THE TRIBE IS A NECESSARY PARTY TO THE SUIT.

The court further says that the statute does not *in terms* make the Indian tribe a necessary defendant, and that the court must gather by implication the statutory intent that such tribe is a

necessary party (id., 357). Owing to the somewhat ambiguous language of the statute this is true, but it is also true that when the statute is read as a whole that implication is a necessary and binding one; for no judgment could be rendered against a person or a corporation or a body politic not a party to the suit. However the party may be brought in, by whatever process the court may acquire jurisdiction, at whatever time the connection with the suit may begin, it is essential that all the parties be properly before the court before judgment can be rendered. This proposition is not negatived by the decision in *Graham* v. *United States* (30 C. Cls. R., 318), since there it was held that the petition charging the Sioux Nation of Indians was sufficient to bring into court all the bands constituting that nation, including the Minneconjou band, which was shown to have committed the depredation.

A complete answer to the proposition thus tentatively advanced as an argument in the earlier portion of the opinion is found in the holding at the close of the same opinion—"that the (Navajo) tribe *is* a necessary party to the case" (id., 361); and also in the decision of the same court in the case of *Woolverton* v. *The Nez Perces* (29 C. Cls. R., 107). In that case the petition charged the Nez Perce tribe of Indians. The proof showed that the depredation was committed by Joseph's band of Nez Perces, and that this band had long been separated from the Nez Perce tribe and constituted

an independent band. The petition was dismissed, and Nott, Ch. J., delivering the opinion of the court, said:

> The defendant Indians are not liable, because they did not commit the depredation. The United States are not liable, because the Indians who committed the depredation, and who were perfectly well known, have not been made parties to the suit. It is a fatal nonjoinder of the responsible party.

III. THE WORDS, "AS NEAR AS MAY BE."

Section 3 of the statute provides:

> That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, *the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be*, the property lost or destroyed and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved.

It is upon the words "as near as may be," in the above section, that the appellee's whole contention must finally rest. If they authorize a claimant to bring suit within the statutory time against the United States as guarantor for some tribe of Indians not disclosed by the pleadings, and confer upon the court jurisdiction to bring in

whatever tribe or tribes may be shown by the evidence to be responsible, and to make such tribe or tribes a primary defendant notwithstanding the limitation of the statute has run in their favor, then the court below was authorized to allow the amendment. But it is respectfully insisted by the appellants that such is not the effect of the phrase quoted.

In the first place, such a power of citing in defendants after the statute has run in their favor, being an extraordinary power and in contravention of the ordinary rules of law, its grant must be clearly and unequivocally expressed. It must not be a matter of inference. The Kiowa Indian tribe in this case claims the right to plead the bar of the statute; and if it is argued that they are excepted from the operation of the statute, while they are bound by the other provisions of the same statute, they are entitled to clear proof that such was the intention of Congress.

Now, when the statute is read as a whole the language quoted does not bear any such construction. The statute provides that service shall be made upon the Attorney-General and that it shall be his duty to defend the Indians as well as the United States (sec. 4); and that the Indians may appear and defend by an attorney employed by themselves with the approval of the Commissioner of Indian Affairs (id.); that the court shall render judgment against the United States and against the tribe of Indians committing the wrong when

such can be identified (sec. 5); that the judgment so rendered shall be paid from some one of the various funds or annuities due to the defendant Indians (sec. 6); that where no such funds are available the judgment shall be paid from the Treasury of the United States and "shall remain a charge against such tribe and shall be deducted from any annuity fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe" (id.); and, finally, that the tribe of Indians, as well as other parties interested in the proceedings, "shall have the same rights of appeal as are or may be reserved in the statutes of the United States in other cases" (sec. 10).

It is apparent that the Indian tribes have thrust upon them by this statute all the responsibilities of defendants. They may appear and defend by their own attorney if they choose, and may appeal to the Supreme Court; judgment is to be rendered against them wherever a case is proven; such judgment is to be paid out of their funds, and if they have no funds available for that purpose, the judgment is to remain a charge against them, to be deducted from future annuities.

Against all these substantive provisions, which necessarily imply the rights and duties and responsibilities of defendants, there is only the general language of a section which purports to be merely descriptive of the petition, which seems to be intended to aid the claimant in framing his

petition, and which begins with advice and conditions concerning the literary style of the petition. It does not seem reasonable, nor in consonance with sound rules of interpretation, to hold that such language, in such context, is sufficient to relieve the claimant from the necessity of proceeding against the responsible defendants, as defined by all other portions of the statute, within the limit of time arbitrarily fixed by the second section.

But if these words have the significance assigned to them by the argument for the appellee, then, considering that they are in conflict with the necessary implication from nearly every other provision of the statute concerning the Indians, and that they contravene the ordinary rules of law concerning the rights of necessary parties to an action, the claimant should be held strictly to the performance of the condition which they impose. They can not be important as against the Indian defendants and unimportant in the claimant's favor. He was in possession of the facts regarding his claim. He knew the witnesses by whom he would prove it. He had three years in which to file his petition. Where is it shown that he named the Indians "as near as may be?" And if that be not shown, how can he claim the benefit of the supposed operation of the clause which requires it?

It is not necessary to go to such lengths in order to find the meaning of the words "as near as may be." In the first place, it is a matter of serious

doubt whether they were ever intended to apply in any measure to the "tribe or tribes" of Indians. In this connection, the words just preceding these are significant. The statute says the petition shall set forth "*the persons, classes of persons*, tribe or tribes, or band of Indians," etc., as near as may be. Again, in section 5 it is provided that the court shall determine if possible the tribe of Indians, *or other persons*, by whom the wrong was committed. Who were "the other persons" referred to in these two sections? Elsewhere the act is silent in regard to them. The jurisdiction which it confers relates only to claims for depredations committed by Indians. No power is given the court to render judgment for wrongs committed by any other persons. Yet here is language which undoubtedly refers to possible depredations by other persons and, apparently, by other persons whose identification is difficult or uncertain. The explanation is to be found in the legislative history of the act, to which the court may look when ambiguities or contradictions exist in a statute. (*Blake* v. *National Banks*, 23 Wall., 307.) The bill which afterwards became a law, as originally drafted, was reciprocal in its provision for the adjudication of claims by Indians against whites as well as those by whites against Indians. In its earlier stages, and as reported by committees in both Houses of Congress, the bill provided for recovery against the United States for the value of property illegally taken from an

Indian or an Indian tribe by white persons. Before the final passage of the act it was amended by striking out the provision for the payment of such claims, in view of the fact that they were already provided for in sections 2154 and 2155 of the Revised Statutes; but in the revision of the bill some phrases were inadvertently retained, which were properly applicable only to claims made by Indians (Cong. Record, vol. 22, pp. 1395, 2910, 3234). These words are mere surplusage, and it is impossible that any effect be given them. Now, it can readily be seen that, since it would be much easier for a white man to identify the tribe of Indians who committed the depredation upon his property than for an Indian to identify the individual white man or men who had wronged him, the language of section 3, which requires such identification "as near as may be," is far more likely to have been intended to apply to the latter class of cases. When the statute is read in the light of this legislative history, of which it bears upon its face such unmistakable marks, it can not be said that the words in question have the meaning claimed for them by the appellee.

Even without this explanation of the presence of the words in section 3, however, full application can be given to the phrase, and has been given in a prior decision of this court and of the Court of Claims. It is conceivable that a depredation may be committed by Indians whom it is impossible to identify as belonging to any tribe; and in such a

case it is held, in the case of *Gorham* v. *The United States* (29 C. Cls. R., 97; 165 U. S., 316), that the claimant is entitled to recover against the United States alone. In that case, although the claimant charged the Comanche and Kiowa Indians and thus satisfied the requirement of naming the tribe of Indians "as near as may be," he was unable to prove that the depredation was committed by Indians of either tribe. In such case it was held that he was entitled to recover against the United States alone.

The appellants' theory of the proper construction of this clause of the statute, assuming that it was intended to apply to claims against Indians, is that the claimant is bound to bring into court, either at the time of filing his petition or by amendment before the expiration of the three years' limitation, the tribe or tribes of Indians responsible for the depredation wherever it is possible with all the means at his command to fix the identity of such tribe or tribes. If he should fail to do this, and the testimony should fail to disclose the tribe, while showing that a depredation was committed by some Indians, then the court may render judgment in favor of the claimant and against the United States, as in the Gorham case. But if the testimony presented by the claimant discloses that the depredation was committed by a tribe of Indians not charged by the claimant, it shows at the same time that he has not done his utmost to bring into court the proper parties defendant; for the

information at his command must have been or should have been equal to that produced in support of his claim. In this event it is either his fault or his misfortune that the statutory bar prevents him from bringing a new suit against the proper parties; but, as in other cases of limitation, the operation of the statute is arbitrary, and the Court of Claims has no power to relieve the claimant from its consequences.

IV. THE FIFTH SECTION—THE FORM OF THE JUDGMENT.

The fifth section of the statute provides:

> That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong, when such can be identified.

The court argues in the Duran opinion that this clause is mandatory and means that judgment must be rendered against the tribe of Indians responsible for the depredations whether it is a party to the suit or not; and that, by necessary implication, it invests the court with power to bring in the responsible defendants at any time before judgment, since judgment can not be rendered against one not a party to the suit. And the court asks, "If the tribe can not be brought in,

how can judgment be rendered against it?" How, indeed? And how would this argument read if advanced in any other case where the statute of limitations was under discussion? The obvious answer is that judgment can not be rendered against it; and that the requirement, which the court regards as mandatory, applies only to cases where the parties are properly before the court and subject to its jurisdiction; where the claimant is a citizen of the United States; where the depredation was committed by Indians within the territorial limits of the United States and within the time limit specified by the statute; where the claimant was not a trespasser upon the Indian lands, and where the fact of the depredation has been proven to the satisfaction of the court. And of all these requirements in the statute, the first and most important is that of jurisdiction of the parties. This section relates merely to the form of the judgment, as section 3 relates to the form of the petition; and the jurisdictional requirements must be sought elsewhere.

The alternative implication in this section, as in section 3, of the existence of cases where the Indians can not be identified is fully explained and applied by the decision in the *Gorham case* (*supra*).

But one other reason is advanced by the court in the Duran opinion. That is the statement that "it is manifest that a claim is filed so as not to be barred by the statute when the petition is filed,"

and numerous cases are cited in support of that statement. The authorities cited, however, with one exception, relate to cases wherein the United States is the sole defendant, and none of them touches upon the point at issue here.

CONSEQUENCES OF THE DECISION.

Certain consequences which follow the decision of the court below argue against it.

The statute provides that it is the right of the Indians to appear by attorney and defend suits brought against them. This is a substantial and valuable privilege. Not only is it possible that an attorney specially employed to defend suits brought against a single tribe may, by reason of superior experience, information, and leisure, interpose a more effectual defense than the attorneys employed by the Government and charged with the defense of several hundred tribes; but it sometimes happens that the defenses of the tribe and of the United States are inconsistent, or that the former are of such nature that the United States is estopped from pleading them. An instance occurs where the title to land is in dispute between the tribe and the United States. If the claimant was a trespasser upon the Indian lands that fact would be a complete defense to the action; but the Attorney-General can not maintain the title of the tribe to the lands where the United States is asserting an adverse claim.

Various tribes have availed themselves of the right to defend by their own attorneys. In the

case of some tribes, as the Utes and Osages, practically every case in which they were made parties defendant during the term provided by the statute has fallen under the scrutiny of competent attorneys employed solely for the purpose of defending the interests of these tribes. In the case of each tribe named the apparent necessity for the employment of such attorneys is nearly at an end; but if it be held that new suits can be brought against them at any time by the simple process of amendment, the same necessity which has led them to employ attorneys in the past would require them to continue such employment indefinitely. It is unnecessary to point out that this is the very condition which it is the object of statutes of limitation to prevent.

Again, it goes without saying that many claims against the Government are brought by unprincipled men, who do not hesitate to employ illegal methods to establish their claims. It is not an uncommon experience to meet with efforts on the part of the claimants to change, by taking additional testimony, or even by retaking the testimony of the same witness, the name of the tribe by which the depredation was committed, the purpose being to show the commission of the depredation by some tribe in amity with the United States, where the tribe charged in the petition has been found hostile by a decision rendered since the original testimony was taken. Still more numerous are the cases where no testimony has ever been

taken and where the claimant, if so disposed, would have an opportunity to manufacture evidence against a tribe whose jurisdictional status at the time of the depredation was unquestioned. A construction of the statute which permits indefinite amendment as to parties defendant, lends itself to the perpetration of this kind of fraud, which is exceedingly difficult to combat.

JUDGMENT CAN NOT BE RENDERED AGAINST THE UNITED STATES ALONE.

In the argument thus far counsel has appeared for the Kiowa Indians, and the question has been considered as affecting their rights under the statute. The United States has, however, an equal interest in the subject. If the judgment of the Court of Claims be reversed on the ground that there was no authority to bring in the responsible Indians after the running of the statute, there is no suit in court, except that against the Ute Indians; and as it has been shown that they did not commit the depredation, the petition must be dismissed. The United States appears simply as guarantor in all cases; the act of March 3, 1891, did not enlarge its liability in this respect (*Corralitos Company* v. *The United States*, 33 C. Cls. R., 342; s. c., 178 U. S., 280). No judgment can be rendered against the United States alone, except in a case where the Indian tribe has not been identified. If the court shall sustain the contention of the appellant tribe of Indians the case will be in the same atti-

tude as that of *Woolverton* v. *The United States and the Nez Percé Indians* (29 C. Cls. R., 107), where the court said:

> The defendant Indians are not liable, because they did not commit the depredation. The United States are not liable, because the Indians who committed the depredation, and who were perfectly well known, have not been made parties to the suit.

RÉSUMÉ.

Summarized, the contentions of the appellants are—

1. The Indian tribe against which judgment is to be rendered in an Indian depredation case is the primary defendant and a necessary party to the suit, having the right to defend by its own attorneys and the right to appeal to the Supreme Court.

2. If action be not commenced against such primary defendants within three years from the date of the statute, it is beyond the power of the court below to bring them in by amendment.

3. In the act of March 3, 1891, no exception is made by which the Indian tribe is deprived of the privilege of pleading the bar of the statute.

4. No argument based on apparent hardship to the claimant can avail against the operation of the statute.

5. The decision of the court below is contrary to the spirit of statutes of limitation; would compel a tribe which desired to defend its own cases to keep an attorney constantly employed long after

the termination of all suits brought against such tribe within the statutory time, and would lend itself to the perpetration of fraud.

6. The United States, being a guarantor only, can not be held liable where the primary defendants, being known, have not been proceeded against within the statutory time.

JOHN G. THOMPSON,
Assistant Attorney-General.

LINCOLN B. SMITH,
Assistant Attorney.

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In the Supreme Court of the United States,

OCTOBER TERM, 1903.

THE UNITED STATES AND THE KIOWA INDIANS, *Appellants*,
vs.
JUAN B. MARTINEZ, Administrator of the estate of JULIO MARTINEZ, deceased.
No. 170.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The Act of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations" (Suppl. R. S., Vol. 1, Sec. Ed., p. 913), provides in Section 2—

> That all claims existing at the time of the taking effect of this act, shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred.

The appellee, within the time provided by this act,

brought his suit in the Court of Claims, averring that the depredation was committed by Indians belonging to the Ute tribe.

In the taking of the testimony, it developed that the depredation was committed by Indians belonging to the Kiowa tribe.

A motion to amend by the substitution of the Kiowa tribe as defendants was made after the expiration of the three years; it was allowed, the defendants' plea in bar being overruled, and judgment was awarded against the United States and the Kiowa Indians.

Seven years prior to the award of this judgment, namely on June 15, 1896, in the case of Duran *vs.* U. S. *et al.* (31 C. Cls., 353), the exact question was considered and the identical amendment permitted.

The appellants seek to distinguish the case at bar from the Duran case with the statement that in the latter the misjoinder was an error on the part of claimant's attorney. While that is true, that fact was not the reason for the decision of the Court permitting the amendment.

It is further sought to distinguish the Duran case from this, in the suggestion that in the Duran case, if a plea of misjoinder or non-joinder had been filed at the commencement of the litigation, the claimant could have discontinued and brought an action against the real defendants; and it is said in the appellant's brief that whatever the merit of that argument in the Duran case, where evidence had been taken and filed in the Department of the Interior before the commencement of the action in the Court of Claims, it can have no possible application to this case. But that is by no means clear, for it is not the filing of an application in the Interior Department, but the filing of a petition in accordance with the Act of March 3, 1891, that establishes the Court's jurisdiction. The mere fact that the claim was differently presented to the Department of the Interior, and that evidence filed there in support of it established the

the claim as there made, does not extend the Court's jurisdiction beyond the subject-matter of the petition. So that it is not material to the present consideration that there is this difference between the case at bar and the Duran case. The cases are in all other particulars identical.

In this connection it is said by the appellants in their brief that from the very nature of the case it is one in which the facts were peculiarly within the knowledge of the claimant, and that the United States, having no actual knowledge of the occurrence, cannot be charged with such knowledge. As to the facts of the owuership of the property and its loss, and the time and place of the loss, the facts were peculiarly within the knowledge of claimants; but when we consider which had the better means of information as to the identity of the Indians, the statement that such knowledge was peculiar to the claimant cannot for a moment be entertained. To the contrary, it is evident that the United States, having agents located all over the territory occupied by Indians, and having troops posted at various points throughout that territory, was in far better position to determine what particular Indians committed a depredation at a given time and place than individual citizens, often strangers in the locality where the depredation was committed, or suffering their depredations by night or in stealthy raids.

The appellee relies confidently upon the reasoning in the opinion in the case of Duran (*supra*), and will cite, under appropriate headings, the pertinent statements of that opinion.

THE DEFENDANTS AT FAULT AND THE OBJECTION TECHNICAL.

Not only is it a fact that the objection is technical, but also that the United States, by its failure to promptly plead is as fully responsible for the misjoinder as the claimant.

It will not be denied that in the defense of cases of this kind the defendants have not pleaded within the time provided by law. By section 4 of the act under consideration it is provided that the Attorney General shall appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him (unless the time shall be extended by order of the Court made in the case) shall file a plea, answer or demurrer on the part of the Government and the Indians. There having been filed almost eleven thousand cases, it was manifestly impossible for the Attorney General to make his appearance and plead within sixty days from the date of the filing of the petition. It has, therefore, grown to be the practice to permit the defendants to file a plea at any time.

The proof in this case was not completed until after the expiration of the statutory period in which new suits might be filed. Then the defendants filed a plea in bar, setting up the misjoinder. If such plea had been filed before the expiration of the statutory period the claimant could have amended, of course, and made the proper parties defendants.

For the same reason that the Attorney General could not file his pleadings within sixty days, the claimant was unable to take his testimony promptly; that is to say, the Attorney General's office was not provided with assistants in such number, and with facilities so great, that prompt response could be made to a notice to take testimony. It resulted that the claimant did not know, prior to the expiration of the statutory period, what his proof would disclose, as to the identity of the depredators.

It is thus seen that the necessities of the Government, and its inability to proceed promptly with its pleadings and with the taking of testimony, contributed as much as anything else, probably more, to the inability of the claimant to name the proper parties defendant prior to the expiration of the three years.

Upon this point, in the case of Duran (*supra*), the Court of Claims says:

> Tested by the practice of the Courts of common law, both parties are in fault. There a defendant would have had to file his plea of misjoinder or non-joinder of parties at the threshold of the litigation, and the plaintiff would have then discontinued and brought a second action against the right defendants. Here the defendants pleaded the general issue and raised the objection after it was too late for the claimant to bring a second suit (31 C. Cls., 355–6).

It must be manifest that the objection is purely technical, because the United States and the Indians are put to no disadvantage by an amendment made after the statutory period. This is said upon the theory, hereinafter presented, that the Indians are not necessary parties defendant to suits of this character.

In this connection, much stress is laid by the defendants upon the fact that the Indians have the right to appear by attorneys of their own selection. It is true that the law so provides; but it is also true that an attorney, seeking to contract with a tribe of Indians for their representation in this jurisdiction, must proceed in accordance with Section 2103 of the Revised Statutes; and the defendants will admit that that clause of this act is a dead letter, because the Secretary of the Interior, under a real or imagined authority, has refused time and again to give his approval to such contracts. For more than three years, but one tribe of Indians has been permitted by the Secretary to appear by an attorney, and even that tribe is now denied such representation.

WHETHER THE TRIBE IS A NECESSARY PARTY TO THE SUIT.

By Section 4, of the act, it is provided that the service of the petition shall be made upon the Attorney General of the

United States. There is no provision for service upon the tribes. It is not necessary even that the claims should ever have been presented to the tribes. (Kemp *vs.* U. S., No. 4777, C. Cls.)

The following provisions of the act make it manifest that the tribes are not necessary parties:

> Section 3. That all claims shall be presented to the Court by petition setting forth in ordinary and concise langugage, without unnecessary repetition, the facts upon which such claims are based, the persons,. classes of persons, tribe or tribes, or band of Indians, by whom the alleged illegal acts were committed, *as near as may be.*

> Section 5. That the Court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, *if possible, the tribe of Indians* or other persons *by whom the wrong was committed,* and shall render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong *when such can be identified.*

These provisions of the act have been construed in opinions which have been long acquiesced in by the appellants.

Upon this point the Court of Claims said, in the case of Duran (*supra*):

> The statute does not in terms make an Indian tribe a necessary defendant. All that it requires in terms is that the petition shall set forth "the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed and the value thereof, and any other facts connected with the transaction and material to the proper adjudication of the case involved." It is manifest that the general purpose of this section is to secure a declaration setting up every known fact which may be of benefit to the defendants, the United States, and

> facilitate their defense. Instead of a formal requirement that every suit shall be *ab initio* against the proper Indian tribe, the Court must gather by implication the statutory intent that the Indian tribe known to be responsible for the depredation is a necessary party defendant in a suit against the United States. And instead of the express requirement that the proper Indian defendant shall be named in the petition, it is merely prescribed that the persons, the tribe, or the band by whom the depredations were committed shall be set forth "as near as may be." (31 C. Cls., 357–8.)

The Court, continuing, declares, upon the authority of numerous decisions of the Court of Claims, that a petition is both process and declaration. By the second section of the act the petition is referred to as "process," and by the third section as a "declaration." The Court says further:

> Consequently, a defect in any matter required by Section 3 may be a matter of amendment, and a strict compliance with the requirements of Section 3 cannot be regarded as conditional to jurisdiction (*Ibid*, 359).

The opinion cites the case of Cowan (5 C. Cls., 107) showing that from an early point in its history the Court has been accustomed to permit such amendments. The opinion makes a comparison between this case and that of Cowan in these words:

> Both actions were brought within a fixed jurisdictional period; the defendants raised no objection until after the jurisdictional period had expired; the mistake was one of parties. On the other hand, there are two differences which are radical: The mistake in the former case was one of law; in the present, one of fact. In the former, the right defendants were sued within the prescribed time; in the latter, they have not been brought within the jurisdiction of the Court. The Cowan case is cited now merely as a declaration of the principle that

> where suits must be brought within a fixed jurisdictional period the Court will not allow a meritorious cause of action to fail because of a mistake of parties or attorneys, if it can be saved by amendment. This principle, so declared in the abandoned or captured property cases, was never departed from and was never disapproved by the Supreme Court. (*Ibid*, 359–60.)

Reference is made also to the case of Thomas (15 C. Cls., 335), where this principle was carried still further in application, and where all the casas on the subject are cited and rèviewed.

Finally it is said by the Court in the Duran case:

> The purpose of the statute was that a suit should be brought within three years; that the cause of action should be definitely described so that the defendants should be apprised of what the claim is, of the place where it originated, of what the property destroyed consisted and by whom the depredation was committed "as near as may be," and that when a suit is so brought and its cause of action so defined the case is subject to all the powers of amendment which a court can exercise in other actions in furtherance of justice. (*Ibid.*, 360.)

Other cases not referred to in this opinion have more or less bearing upon the question under consideration.

In the case of Gorham, it was found that the depredation was committed by Indians whom the evidence did not identify. A judgment was entered against the United States alone. In that case the Court of Claims declared that—

> Judgment against an Indian tribe is not a necessary condition to judgment against the United States in an action under the Indian depredation act of 1891 (29 C. Cls,. 97).

That case was brought to the Supreme Court of the United States, where it was affirmed, the Court declaring that judgment "may be rendered against the United States

alone when the tribe of Indians to which the depredators belonged cannot be identified, and such inability is stated." (Gorham *vs.* U. S., 165 U. S., p. 316).

In the case of Graham, where the claimant had brought his action against the "Sioux Indians," the Court of Claims held that the Sioux Nation, comprising, as it did, very many distinct bands, was not suable in that name, but that a suit against the "Sioux Indians" comprehended all its independent bands, and that, after the expiration of the statutory period, the Court, of its own motion, would so amend its judgment as that it might run against the particular band of the Sioux whose members were shown to have committed the depredation. (Graham *vs.* U. S. *et al.*, 30 C. Cls., 318).

In the case of Wolverton, the Court declared that there were two classes of cases where the United States was responsible; first, where the Indian defendants are responsible but without funds to respond in damages; and second, where the depredations were committed by Indians whose tribal relations cannot be ascertained. (Wolverton *vs.* U. S. *et al.*, 29 C. Cls., 107).

From all these decisions, it seems that it ought to be very well settled that Indian tribes are not necessary parties defendant. It is true it is the duty of a claimant to name the tribe whose members committed the depredations, as near as may be, that is, if he can do so; but the mere statement of the condition necessarily establishes the inference that if he fail in his attempt to correctly state the tribe, the tribe really guilty may be identified at any time.

It is true that it is the duty of the Court to ascertain the tribe and to include it in its judgment, if it can do so; but it has been authoritatively settled, as we have shown, that if it cannot do so, then judgment may be rendered against the United States alone. *Now if, in any case, a judgment can be rendered against the United States alone, it would seem necessarily to follow that in no case is the tribe of Indi-*

ans a necessary party defendant, to be named as such in the petition; for the obvious reason, that if, in any one case, a tribe is not a necessary party defendant, that must be true of all cases. There is no distinction made in the act. The object of the requirement to name the tribe, if it can be done, is that the Court may identify and include it in its judgment.

In this connection, the appellants suggest that by whatever process the Court may acquire jurisdiction "it is essential that all the parties be properly before the Court before judgment can be rendered." This statement entirely ignores the fact that no service of process whatever is made upon Indian tribes, and that in the Indian depredations act, we have provisions absolutely without precedent. In no other jurisdiction, and under no other law, can parties be made defendants to a suit without notice of its institution. The right or power of Congress to authorize a judgment against an Indian tribe without the service of process, is a necessary consequence of the decision of this honorable Court in the case of Lone Wolf (187 U. S., 553). It was an instance of the exercise of such authority, when Congress, by the Act of March 3, 1891, provided for judgment against Indian tribes without notice to them. The fact that notice was not to be given them is an unanswerable argument to show that the tribes are not necessary parties.

We cannot agree with the appellants that their proposition is not negatived by the decision in the case of Graham (*supra*), because it was there held that the petition charging the Sioux Nation of Indians brought into Court every band of that nation, when as a fact those bands were maintained on reservations hundreds of miles apart, were parties to different treaties, received rations, annuities and other payments which were not at all uniform, and in all other particulars existed as independent tribes or bands.

THE WORDS "AS NEAR AS MAY BE," "IF POSSIBLE," AND "WHEN SUCH CAN BE IDENTIFIED."

As herinbefore shown, the petition is to describe the band of Indians "as near as may be," and the Court is to determine the tribe "if possible," and to award a judgment against the United States and against the Indians, "when such can be identified."

No unwarrantable liberty is taken in the statement that with many tribes of Indians inhabitating the same localities, and with depredations committed, generally at night, or stealthily, claimants in many cases could not be expected to positively identify the tribe to which the depredating Indians belonged. And in the prosecution of such cases, claimants have depended for proof of the identity of the Indians, either on the locality, it being one where but one band was accustomed to commit depredations, or upon the circumstance of finding a moccasin peculiar to a tribe, or a quirt, or a dogwood arrow such as the Comanches used, or a tule arrow such as the Apaches used, or a pony with ears split, bearing a peculiar brand known to be the brand of a certain tribe. It was, therefore, very reasonable that the law qualify the requirement of naming the Indians as defendants by the use of the words "as near as may be." That was not at all because it was necessary to have an Indian tribe as defendant; but, as we have said, solely for the purpose of enabling the Court to identify the tribe, if possible, so as to charge the judgment against its funds. Now if the claimants are to charge the Indians "as near as may be;" if they are placed under the duty of identifying the Indians from their best information, it must result that positive identification is not necessary; and that the Court has the authority, whenever it awards its judgment, to award it against the Indians shown to have been actually guilty.

It is suggested by the appellants that there is nothing in

the record to show that the claimant named the Indians in his petition as nearly as he could. Certainly the most reasonable presumption is that he did that. He could have had no possible object in naming a tribe as a defendant, unless he believed that the depredation was committed by members of that tribe.

The appellants seek to explain the use of the words "as near as may be," by calling to the attention of the Court the legislative history of the Act of March 3, 1891, with the statement, from that history, that the bill as originally drawn, was reciprocal in its provision for the adjudication also of claims by Indians against whites, and that the words "as near as may be," were intended to apply to other persons, that is to say, to white persons, and not intended to apply to Indians. Then occurs this remarkable statement in the appellant's brief:

> Now it can be readily seen that since it would be much easier for a white man to identify the tribe of Indians who committed the depredation upon his property than for an Indian to identify the individual white man or men who had wronged him, the language of Section 3, which requires such identification "as near as may be," is far more likely to have been intended to apply to the latter class of cases.

We say this statement is remarkable, because it would seem far easier, where the depredation was witnessed, for the Indian to show that a white man had committed the depredation, than for a white man who suffered a depredation in a country, for instance, where there were many tribes of Indians, or where he was a stranger, to show, not only that the depredators were red men, but also to identify the particular tribe whose members committed the depredation. A parallel would have been more nearly approximated, if the case of a claim by an Indian had been supposed, who should be required to show, not only that the wrong-doer was

white, but whether he was a Dutchman, an Irishman, an Italian, a Frenchman, a Swede, a Pole, a Hungarian, a "down easter," a "Georgia cracker," or an inhabitant of some section, or one of some particular nationality, with none of whom had the Indians less acquaintance than had the average white man with the distinctive features, dress and equipments of the numerous tribes.

If, in the act as at first proposed, the words "as near as may be" applied to both white men and Indian tribes, the removal of the provision as to suits against white men certainly did not affect the application of the words "as near as may be" to tribes of Indians. As entirely corroborating this statement is the subsequent direction of the act in Section 5, that the court shall, "if possible," name "the tribe of Indians," and render judgment against "the tribe of Indians, when such can be identified."

The appellants say, however, that it is possible to conceive that the depredation might have been committed by Indians whose tribe could not be identified, and that in such case the claimant would be entitled to recover against the United States alone. This is said from necessity, by reason of the opinion in the case of Gorham (*supra*). But the suggestion puts a premium on a refusal to attempt to identify the Indians and on disobedience to the mandate of the law that the claimant shall name them "as near as may be." Which claimant is entitled to greater consideration; which brings himself most fairly into court; the man who contents himself with the averment that he cannot identify the Indians, or the man who, attempting to identify them, does so, "as near as may be"?

The appellants would make light of the interpretation, by the Court of Claims, of the direction in the 5th section of the statute, that the Indians shall be named in the judgment, "when such can be identified." In this connection, the court says in the Duran case (*supra*), "If the tribe can-

not be brought in, how can judgment be rendered against it?" That seems to counsel to be a most pertinent inquiry.

In that section is a direction to the court to identify the tribe "if possible" and to include it in its judgment, when it can do so. No condition is attached to this direction. It is important, therefore, to repeat the court's question, how can such judgment be rendered unless, under the act, the responsible defendants may at any time be brought into court?

Let us suppose that the claimant has averred in his petition that the depredators were unknown Indians; but that in the progress of the cause their identity is developed; shall the court, charged to name the guilty Indians in its judgment, if possible, ignore the evidence on identity merely because the tribe really guilty was not made a party, and render judgment against "unknown Indians," merely because the petition stated that they were unknown? Shall it dismiss the suit because the claimant, alleging that the Indians were unknown, has nevertheless established their identity? Or shall it have regard to the evidence on identity, and to the direction of the act, and advise Congress, by its judgment, who the guilty parties were? If such is its duty, then certainly an amended petition should be permitted naming the real defendants.

It is true that this might be a "peculiar argument," if advanced "in any other case where the statute of limitations was under discussion." But as we have said, we have a law in the Act of March 3, 1891, unlike any other law that ever has been enacted; and most probably unlike any other law that ever will be enacted; a law, justified, as this court itself has practically declared, by reason of the peculiar relations we sustain to Indian tribes; a law, justified in all its particulars, and in more, by the promise of indemnification made by the United States since the year 1796; a law which is not attacked by the defendants because it omits the provisions (vital in all other jurisdictions and against all other defend-

ants) for service of process upon the defendants. Surely this suggestion does not need further elucidation.

The appellants say further in criticism of the statement in the Duran opinion, that "It is manifest that a claim is filed so as not to be barred by the statute, when the petition is filed," that "the authorities cited in support of the suggestion, relate to cases (with one exception) where the United States is the sole defendant." The author of the brief has overlooked the case of Garcia *vs.* the United States and Apache Indians, (37 C. Clms. 243), in which the court held that a suit brought in the name of one partner as the sole owner, might be amended after the expiration of the statutory period, by the bringing in of the other partners, so that they might participate in the judgment.

The defendants acquiesced in this decision.

It would seem that if new parties claimant might be made after the expiration of the statutory period, there might by parity of reasoning, be new parties defendant. The theory of the decision in the Garcia case was that the filing of the petition effected the presentation of the entire claim. That is one of the theories on which this decision is based. If in the Garcia case by admitting new parties claimant, the Indians had to pay the claim of *all* the partners, when, but for the amendment, they would have had to pay but one-third the claim, surely there was as much ground for complaint as in this case, where by an amendment upon exactly the same theory (without regard to other reasons) guilty Indians are made to pay a claim presented duly and in accordance with the law, to their guardian. If anything repugnant is to be found in the decision in the case at bar, something equally repugnant is to be found in the decision in the Garcia case. It offends no more the sense of justice that, as the result of amendment, a tribe should have to pay a claim for which, under the original proceedings it could not have been mulcted, than that by the same process it should be compelled to pay three times

as much as it would have been liable for, under the original pleadings.

In attempting to convince the Court that there may be some dire consequences, if the decision of the Court in the Duran case be followed, the appellants again refer to the right of the Indians to appear by attorneys and defend a suit brought against them. It is asserted that this is a substantial privilege, and that in some instances the defenses of the tribe could not be fairly offered because they might present some claim opposed to the interests of the United States. The appellants have taken the liberty to make statements to the Court to the effect that various tribes have availed themselves of the right to defend by their own attorneys, aud that as to two tribes, every case in which they were made parties defendant during the term provided by the statute has fallen under the scrutiny of competent attorneys employed solely for the purpose of defending the interests of these tribes. Admitting that such is the case as to claims against the Utes and Osages, and availing himself of the liberty thus invited to be taken, counsel would state to the Court that the Kiowas and Comanches, the Cheyennes and Arapahoes, the Sioux, the Apaches, the Indians of Washington, Oregon and California, against whom, perhaps, nineteen-twentieths of all the eleven thousand cases filed in this jurisdiction have been brought, have either not been represented by attorneys or have appointed attorneys whose contracts for their representation the Secretary of the Interior has persistently refused to allow; and, therefore, that in the great majority of the cases there has never been any separate representation of the Indians. Counsel also states further that in the course of the prosecution of, perhaps, one-third the total number of cases filed, an instance has never come under his observation, nor has he ever heard of an instance, where the interests of the United States have conflicted with the proper representa-

tion, by the attorneys of the United States, of the Indian tribes.

Another of the consequences which the appellants' counsel suggests is that by permitting amendments of this character, substituting the tribe which should be the real defendants, unprincipled men may make an effort to prove the guilt of a different tribe than that alleged in the original petition. The suggestion ignores the fact that this is a matter for proof, not of pleading; and it ignores also the decision of the Court in the case of Johnson *vs.* the United States (35 Ct. Cls., 552), where the opinion declares that if, after a claimant has testified to a given date which by a subsequent finding of the Court falls within a period of hostility, a re-examination be had of the claimant or of his witnesses for the purpose of proving a different date falling within a period of amity, the Court will decline to consider the evidence tending to establish the latter date. Such decision is, of course, applicable to a change of tribes made upon similar inducement, and it has been many times so held.

Counsel may be permitted to conclude this brief with a statement of two typical cases now pending in the court of Claims, which illustrate the reasonableness of the positions taken in this brief:

Three families from Arizona, emigrating to California, were attacked at night in the neighborhood of Fort Hall, Idaho. Their outfit was taken and eight of the party killed by the Indians. (Dykes *vs.* U. S., No. 10656, C. Cls.) The section in which this attack occurred was inhabited by Bannocks, Piutes, Shoshones, Snakes, and perhaps a half dozen other tribes, insignificant in numbers, but equally bent on the destruction of property. The claimants were strangers from a far land, would not have been able to identify the Indians had they been in clear view of them in broad daylight, could not in good conscience have inculpated all the

tribes, and, therefore, naturally imputed the depredation to the most populous tribe—the Bannocks; but no living man could, from the signs left at the place of the attack, or from the manner of the attack, or from its consequences, positively identify the tribe to which those Indians belonged.

The second case is this: In August, 1866, an Indian raid was made on the headwaters of the San Saba River in Texas. Forty-six cattle owners lost cattle in this raid. There was some discussion at the time as to the identity of the Indians. During this raid a man named Dawson heard the Indians cry out "Apaches." Dawson was acting as agent for six other persons whose cattle were being maintained on the same range and who lost cattle in the raid. A near neighbor of Dawson was another cattle owner, who, in addition to caring for his own cattle, was charged with the care of cattle belonging to five other owners. Ignorant himself of Indian dress and appearance and characteristics, and unable to distinguish them, he accepted the statement of Dawson, to whom the Indians shouted that they were Apaches, and in the petitions filed by these two persons for themselves, and as the representatives of those whose cattle they had in charge, being thirteen in all, it was averred that the depredating Indians were Apaches. One lone claimant averred that the Indians were Kickapoos. Twenty-nine other claimants averred that they were Comanches. It has since been shown that every sign found on the trail of the cattle, such as arrows, quirts, moccasins and ponies bearing a peculiar brand, indicated the presence of Comanches.

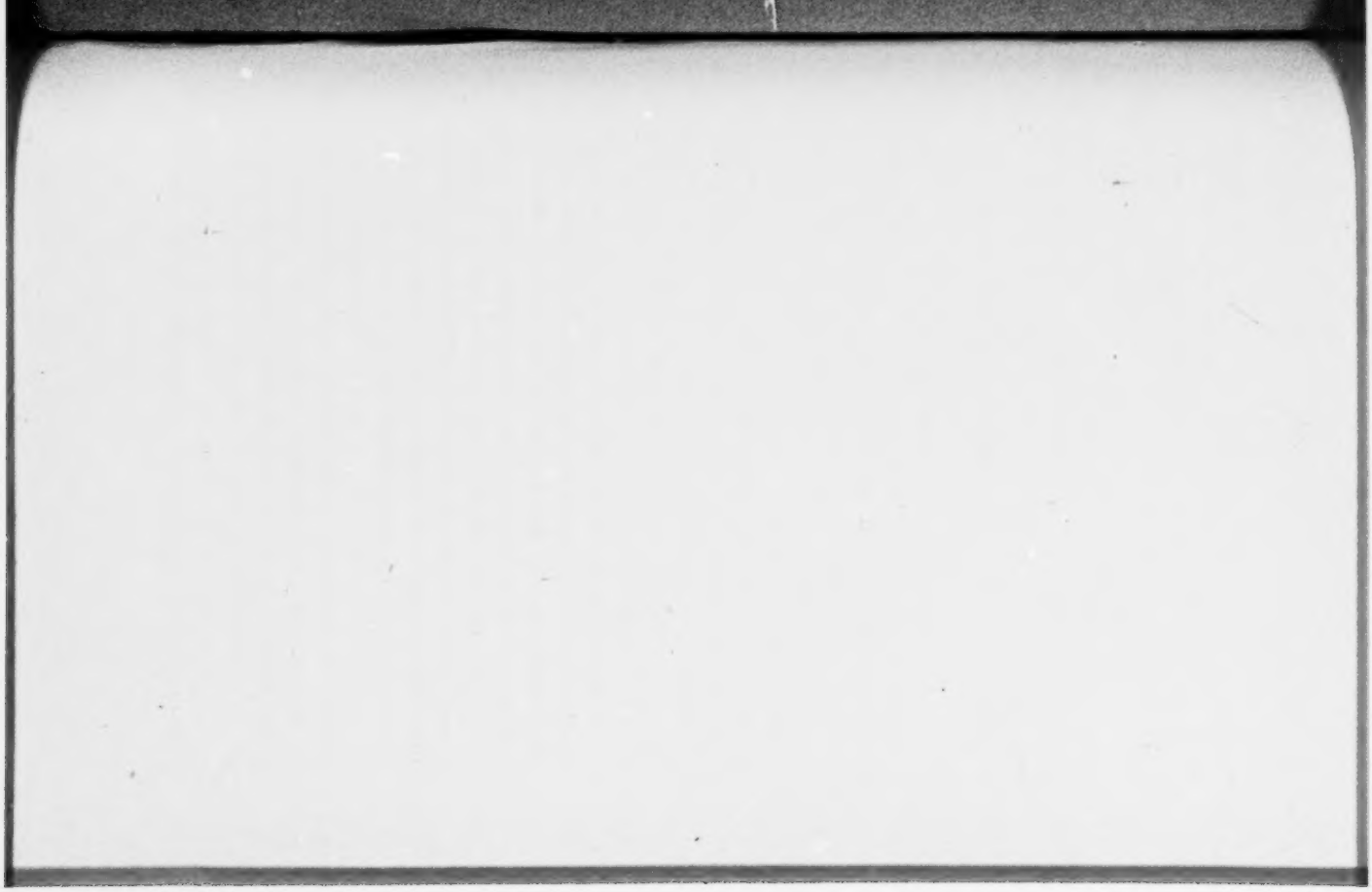
If this Court should hold that absolute and accurate identification, prior to the end of the three years, is necessary, and that amendments as to parties are not permissible after that time, the thirteen claimants who unquestionably suffered the loss of the cattle on the identical day, and at the hands of the same Indians, would fail to recover, while their

twenty-nine neighbors, *who made a better guess*, would recover for their losses.

It is inconceivable that it was the purpose of the lawmakers to exclude sufferers in either of these depredations, from a recovery, because they could not positively identify the tribe, or because of a difference of opinion on the subject of identity.

The Court of Claims and this Honorable Court have decided that when the Indian tribes are unknown, the claimants may recover against the United States alone; and we respectfully submit that the principle of that decision extends to the case at bar, and establishes, beyond reasonable question, that the amendment naming the tribe whose members were the guilty parties may be made at any time.

WILLIAM H. ROBESON,
Attorney for Appellee.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES and the KIOWA INDIANS, Appellants,

vs.

JUAN B. MARTINEZ, Administrator of the Estate of JULIO MARTINEZ, Deceased, Appellee.

No. 15.

Petition For Appellee For Rehearing.

WILLIAM H. ROBESON,
Attorney for Appellee.

IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES and the KIOWA INDIANS, Appellants,

vs.

JUAN B. MARTINEZ, Admr. of the Estate of Julio Martinez, deceased, Appellee.

No. 15.

PETITION OF APPELLEE FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Juan B. Martinez, appellee in this cause, feeling aggrieved by the decision of this Honorable Court reversing the judgment of the Court of Claims, and believing, from a careful consideration of the opinion of this Court, delivered herein, that substantial questions were overlooked by the Court or were not considered by it, most respectfully petitions for a rehearing of this cause, and shows unto the Court as follows:

The decision of this Court was that after the expiration of the three years in which, by the Act of March 3, 1891, known as the Indian Depredations Act, it was pro-

vided that claims on account of Indian depredations might be filed against the United States and the Indians, no amendment substituting other tribes of Indians than those named prior to March 3, 1894, should be permitted.

In the opinion of the majority it is said—

> "Whichever form the action takes, it must be brought within three years after the passage of the act, as provided by the first section. In requiring the band or tribe of Indians to be described, as near as may be, it is the purpose of the act to require such tribe primarily liable for the injury to be brought before the Court, when they can be identified for the purpose of the judgment authorized in the fifth section. All the sections are to be read together to effectuate the purpose of the law, and when the tribe 'can be identified' it must be described as near as may be, that is, with reasonable accuracy, sufficiently identifying the party for the purposes of the action and judgment, resorting to the liability of the United States alone only in cases where the offending parties cannot be identified." 195 U. S., 469–474.

It is very respectfully but very earnestly submitted to the Court that there are two instances of error in this very material statement. The first of these is the declaration of the opinion that "when the tribe can be identified, it must be described as near as may be." This declaration seems to disregard the fact that identification is the duty of the Court, and inasmuch as the identification is to be made by the Court in its judgment, therefore, identification by the Court must, of course, be subsequent to the description of the Indians "as near as may be" by the claimant.

The petitioner in one of these cases was not to "identify," but to "set forth" the Indians "as near as may be." Proof is then to be taken, not merely on the subject of the depredation, but also on the subject of the identity of the Indians; for a finding by the Court on each subject is imperative, and when such proof is taken, then it is the duty of the Court to determine whether the depredation has been committed, and if so, by what Indians. In this connection, but in another part of the opinion (*Ibid.*, p. 475), it is stated that the claimant, under the Act of March 3, 1891, had three years in which to determine the identity of the Indians. That seems to disregard the evident fact—evident from conditions affecting the Indians and their relations with citizens of the United States, of which the Court must know—that if the claimant had been given ten years or thirty years for that purpose, he might still have been unable to identify them. Such was the condition in the case of Joshua Gorham. (165 U. S., 316.) A claimant was not required, I respectfully submit, to identify the Indians, but only to set them forth as nearly as he could.

And herein lies what seems to counsel to be the second error in the paragraph quoted, these being the words:

> It must be described as near as may be, that is with reasonable accuracy, sufficiently identifying the party for the purposes of the action and judgment. *Ibid.*, p. 475.

I submit that the Court has given in this statement an incorrect definition and application to the words "as near as may be." In the light in which counsel reads

those words, the interpretation given by the Court to them would seem to be as if the *tribe* was to be described "as near as may be." There can be no approximation to the description of a tribe. There is but one way to identify it. An Indian tribe is described, and described accurately, by the designation "Sioux," or "Cheyenne," or "Comanche," or "Apache," and it can not be described in any other way. The act says:

> Section 3. That all claims shall be presented to the court, setting forth in ordinary and concise language, without unnecessary repetition, the persons, classes of persons, tribe or tribes, or band of Indians, by whom the alleged illegal acts were committed, as near as may be.

The tribe is not to be *identified*, nor to be described "as near as may be," but to be named, "to be set forth" "as near as may be." Now it is respectfully submitted that those words "as near as may be" are not to be interpreted otherwise than that if the petition name to the best of petitioner's ability the Indians, if he do his best to set them forth, he has complied with the provisions of the act. And if, by reason of the innumerable, and at times insuperable difficulties in the way of identifying the Indians, he fail in his effort to designate the tribe to which the guilty parties belonged, nevertheless he has complied with the requirement of the law. Counsel's position as to this can be thus illustraied:

On one reservation have been maintained for many years the Kiowas, Comanches, and a certain band of Apache Indians. The reservation was known to the authorities of the Government as the Kiowa, Comanche,

and Apache Reservation, but all the Indians on that reservation were generally known as Comanches, by reason of the fact that the Comanche tribe was superior to either or both of the others in numbers. Now, suppose a depredation had been committed within a few miles of their reservation and in a section where certainly no other Indians were given to the commission of depredations. A claimant loses a band of horses. He traces these horses by their trail into the borders of the reservation. Under the law he could not cross those borders in pursuit of his property. He does not see the Indians commit the depredation; it perhaps occurred at night, and he is able to impute the depredation to them only from the circumstances or locality and from the direction and termination of the trail. Naturally he would charge this depredation to the Kiowa, Comanche, and Apache Indians. If, naturally, he would have done this, has he not set forth "as near as may be" the Indians who committed the depredation? It may have been, however, that a party of Wichitas or Caddoes, who then lived adjacent to the Kiowa, Comanche, and Apache reservation, had taken those horses and driven them back to their own home through the reservation of the Kiowas, Comanches, and Apaches. That fact is one which might not be discovered for twenty years; it might never be discovered. Now, under this opinion of the court, the claimant having done all that a reasonable, intelligent man could do in attempting to set forth the Indians, will, nevertheless, be denied judgment, if by some unlucky mishap he should subsequently learn,

and be honest enough to prove, that the Indians were Wichitaws or Caddoes—other Indians than those who he believed and who he had the right to believe, from the circumstances, committed his depredation. Yet, I submit to the court, he set forth the depredators as near as possible; but under the decision of this court, he is required to be absolutely accurate in his identification of the Indians; his judgment, in order to entitle him to recover, must, upon that point, be infallible; it must be only the foreshadowing of the judgment of the Court of Claims, which reaches its judgment only after all sources of proof have been exhausted, all possible lights shed upon the identity of the Indians. Is it to be supposed that Congress ever intended that such results should be accomplished?

The Court in its opinion says (and we make no complaint of that), that all the sections of the act are to be read together to effectuate the purposes of the law. Now it is submitted the words "as near as may be," "if possible," and "when such can be identified," all bear upon exactly the same proposition, namely, the identification of the Indians to the end that in such judgments as the Court might award, the Indians were to be named as defendants. Therefore, these terms of expression, all bearing upon the same proposition, should each receive the same construction. Now the Court has decided in the Gorham case (165 U. S., 316), that the words "when such can be identified," applied to the judgment of the Court as a direction to the Court in the award of judgment, mean that when the Indians cannot be identified,

the Court is not to attempt it, but is to render its judgment against the United States alone. Similarly, it was declared, in the same case, with reference to the direction to the Court to determine "if possible" the tribe of Indians, that if it is not possible, then the Court of Claims is not to attempt it, but to proceed to render its judgment against the United States alone. In other words, it is clear that the Court has given a meaning to these last instructions which, in this opinion, it refuses to give to the instruction directed to the claimant; that is to say, it has adjudicated that if it is not possible to determine the tribe, the Court is not to attempt it, and if the Indians cannot be identified, then judgment is to be awarded against the United States alone; but as to the claimant in nine cases out of ten, or perhaps in greater proportion, utterly unable to identify the thieves who stole his horses in the night, he is, nevertheless, to be held to forfeit his claim because he had not set forth accurately the Indians which the Court itself might possibly, after reading volumes of proof, be unable to determine. Why shall we not say, in view of these things, that if the petitioner has set forth the Indians "as near as may be" he shall, even if he failed in positive and accurate identification, yet be entitled to the judgment which the Court has the privilege of awarding and is directed to award in cases where it is not possible to determine accurately the identity of the depredating Indians.

Some suggestions are made in the brief filed on the original hearing of this cause, which it seems to me have

not received sufficient consideration by this Honorable Court, and one of these in particular seems from this opinion to have been directed to the very question which may be assumed to have been the chief inducement to this judgment. That inducement is that, after the expiration of the time in which new suits were allowed to be brought, a new party, under the prevailing practice in the Court of Claims, could be brought in. A perfect answer to that objection is that the Indians are not necessary parties to the suit. Is there, in any other litigation, a right to a judgment against any defendant, when either by personal service or by publication or by service upon a guardian, trustee or committee, notice of the institution of the suit has not been brought home to the defendant? We have here an act which provides that notice shall not be necessary to be given to the Indians, but that service upon the Attorney-General is notice to all the Indian tribes, nations or bands within the United States. When the Court decided the Gorham case (*supra*), authorizing an award of judgment against the United States alone, it then and there necessarily decided *that the Indians were not necessary parties;* for, if they had been necessary parties, the Court could not have rendered that judgment against the United States alone. Now is there reason for a holding that in one of these eleven thousand cases the Indians may not be necessary parties, and yet that in all the other ten thousand, nine hundred ninety-nine they are? Is there not reason and strong reason for the proposition that if the Court, in one of the cases, holds Indians not to be necessary

parties, it cannot in any case hold them to be necessary parties? The action in the Gorham case and this action case were based upon acts of Indians of exactly the same kind, and the right to recover for losses following those acts depends exactly upon the same law. If, therefore, Indians are not necessary parties in this case, then can it possibly make any difference that, under the direction of the act and in good faith to aid the Government in charging up the judgments to the guilty parties, the claimant failed to ascertain, before bringing his suit, the indentity of the Indians?

Another suggestion was made by counsel in argument which it seems to him should have received the consideration of the Court. He was, perhaps, unhappy in his statement of it. An incident was supposed in which the claimant had averred in his petition that the depredators were unknown Indians. In that petition the petitioner did not comply with the direction of the law to name the Indians as near as may be. In the progress of the cause the identity of the Indians is developed, but the evidence disclosing the identity is not taken until after the expiration of the period in which claims of this character might be filed in the Court of Claims. When that case came on to be heard by the Court of Claims, was it the duty of the Court to determine and to ascertain that tribe shown by the proof to have been guilty of the depredation, or was the Court, because the claimant had previously announced his inability to identify the Indians, to make a finding against the United States alone, in the face of the evidence in the record

showing the identity of the Indians? Should the Court dismiss a suit because the claimant, alleging that the Indians were unknown nevertheless established their identity? Or should it have regard to the evidence on identity, and to the peremptory direction of the act, and advise Congress by its judgment who the guilty parties were? It is the logical result of the decision in this case that, in such a case as just instanced, the Court should disregard the requirement made by Congress to identify the Indians, when it could do so, merely because the claimant, when he brought his action, was unable to identify them, and because the identity was established after the expiration of the three years in which suit might be brought. Any other decision would negative also the decision in the Gorham case.

The Indian Depredations Act is unlike any other act by which the United States has assumed liability. In the first place, it provides a gratuity, for while the promise had been made for more than a century, it was gratuitous at the outset. In the second place, it provides for the bringing of a suit and the award of judgment against defendants who were not to be given notice of the institution of the suit, and it contains other unusual provisions, among them those which arise and are being considered in this case. In view of the unusual character of the act, and the lack of precedents other than those which have been cited, it is permissible for counsel to give an actual instance of the great injustice which will result if the decree of the court in this case be sustained:

On the 7th day of August, 1866, a party of 300 Indians from the Kiowa, Comanche, and Apache Reservation, made a famous raid through the valley of the San Saba River in Texas. Since the original argument of this cause in this court, the evidence in the cases arising from losses suffered in that depredation has been concluded. It appears from that evidence that the Indians drove away some twenty or twenty-five thousand head of cattle belonging to fifty or sixty different owners. It seems that the Indians started in to make the drive of the cattle at a point some distance south from the head of the river, while others concealed themselves near the head of the river and joined in with the others as they came, driving the cattle they had gathered up the river. Those Indians came into contact with a small party of cattlemen on the head waters of the river. Every one of those cattlemen, believing the Indians to be the Apaches by their stature, declared in their petitions against the Apache Indians, and upon their advice, others not familiar with the dress and appearance of any Indians declared also against the Apaches.

But a considerable number of the claimants, who lived at those points on the river where the Comanche and Kiowas came in making their drive, and having knowledge of the dress and physical appearance of the Comanches and Kiowas, imputed the depredation to them. Now under the decision of the court in this case, it having now been determined that the Indians were Comanches, every claimant who imputed the depredation to the Apaches must lose his suit, while those fortu-

nate enough to accept advice that the Indians were Comanches and those who saw Comanche Indians and who, therefore, named the Comanches as the depredators, will recover a judgment. And yet, those persons living near the head of the river who believed they saw Apaches, with equally good reason named them as defendants. This furnishes the Court an illustration of a case wherein the claimant "as near as may be" identified the Indians who committed the depredation. How may it be justly said to comport with either the spirit or the letter of the Act of March 3, 1891, that claimants must not merely set forth the Indians "as near as may be," but must, with absolute exactness and with the utmost accuracy, describe the depredators.

It would be presumptuous in counsel to discuss the effect of the Gorham case, in view of the discussion of that case by Mr. Justice White and Mr. Justice McKenna in their dissenting opinion, but it is not indelicate to repeat one statement of that opinion with reference to the opinion of the majority, being in these words:

> "To adopt it without specifically overruling the Gorham case, it seems to me, is to declare on the one hand that it is not essential to prove the allegation that the wrong was committed by a particular tribe, and on the other hand to say that the allegations as to the tribe committing the wrong were essential to the cause of action. That is, to declare that a particular allegation is at the same time both essential and non-essential—essential to be alleged but not essential to be proved."

For all the reasons hereinbefore given, it is, therefore, respectfully prayed that this petitioner be granted a rehearing.

WILLIAM H. ROBESON,
Attorney for Petitioner and Appellee.

I, William H. Robeson, attorney for the appellee, who is also the petitioner, do hereby certify that the foregoing petition is in my opinion well founded in law, and that it is not interposed for delay.

WILLIAM H. ROBESON.

Supreme Court of the United States.

No. 15.—October Term, 1904.

The United States and The Kiowa Indians, Appellants, *vs.* Juan B. Martinez, Administrator of Julio Martinez, deceased.	Appeal from the Court of Claims.

[December 5, 1904.]

This action was brought in the Court of Claims on October 24, 1891, to recover damages against the United States and the Ute tribe of Indians in the sum of fourteen hundred dollars, the value of certain sheep alleged to have been taken and destroyed or used in June, 1873, by the said Indians. The petition was filed under the provisions of the act of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations." (26 Stat. 851.) On February 5, 1902, the Assistant Attorney General of the United States answered the allegations of the petition by a general denial. On November 4, 1902, the claimant filed a motion for leave to file an amended petition, charging the depredation to have been committed by the Kiowa Indians, which motion was allowed, and upon the same day the amended petition was filed. On November 5, 1902, the Assistant Attorney General, appearing on behalf of the United States and the Kiowa Indians, filed a plea to the amended petition, setting up that no action had been commenced against the Kiowa Indians within three years after the passage of the act of March 3, 1891. On November 11, 1902, this plea in bar was overruled, and, upon the general issue being pleaded and trial had, the court found as a matter of fact: At the time of the depredation the claimant's decedent was a citizen of the United States. In June, 1873, in Mora County, New Mexico, Indians belonging to the Kiowa tribe took and drove away property of the kind and character described in the petition, the property of claimant's decedent, which was reasonably worth the sum of six hundred and ninety dollars. At the time of said depredation defendant Indians were in amity with the United States.

As a conclusion of law the majority of the court decided that the claimant recover a judgment against the United States and the Kiowa Indians in the sum of six hundred and ninety dollars.

The defendants appealed to this court.

Mr. Justice DAY delivered the opinion of the Court.

This claim arises under the Indian Depredation Act of March 3, 1891, (26 Stat. 851,) and presents the question whether, after the expiration of three years from the filing of the petition in the Court of Claims, a tribe of Indians, not originally named in the petition, can be brought into the action by amended petition with a view to proceeding against such tribe to judgment. The record discloses that the original petition was filed on October 24, 1891; the amended petition on November 4, 1902. The Attorney General filed a plea setting up the bar of the statute, which plea was overruled, and thereafter, upon issue joined and testimony taken, judgment was rendered against the tribe of Indians so brought in by the amended petition.

The act in question was before this court in *United States* v. *Gorham*, (165 U. S. 316,) and in that case it was held that, where the Indian tribe cannot be identified, a judgment for the amount of the claim can be rendered against the United States. In the opinion of the court in that case the act was analyzed and its various sections construed, and it only remains to consider so much of the act and its purposes as will lead to a solution of the question now under consideration.

The provisions of the first section of the act are positive, that all claims existing at the time of the taking of effect of the act shall be presented to the court by petition, as therein provided, within three years after the passage of the act, or be forever barred. This section, by itself considered, would seem to conclude the right of the petitioner to bring in a new party to the proceeding after the expiration of three years in such wise as to preclude the right to rely upon the bar of the statute. For obvious reasons, a party brought into court by an amendment, and who has for the first time an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court. (*Miller* v. *McIntyre*, 6 Pet. 61.) Conceding this proposition as applied to ordinary actions, it is urged that this proceeding is so peculiar in character as to take it out of the general rule. Section 3 of the act provides:

"That all claims shall be presented to the court by petition, setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved."

The fifth section of the statute provides:

"That the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was

committed, and shall render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong, when such can be identified."

Section 4 provides for service upon the Attorney General, whose duty it is to appear and defend for both the interests of the Government and the Indians, and giving to any Indian or Indians interested in the proceedings the right to appear and defend by an attorney employed with the approval of the Commissioner of Indian Affairs. By the sixth section the amount of the judgment is charged against the tribe by which or the members of which the depredation was committed, and if no annuity, fund or appropriation is available as provided, the judgment is to be paid from the Treasury of the United States, to remain a charge against the tribe, and to be deducted from any annuity, fund or appropriation thereafter due from the United States to such tribe. It is contended that inasmuch as the Indian tribes are not necessary parties to the proceeding and are not required to be served with process except so far as the notice to the Attorney General is such service, and are only to be described "as near as may be," they may be brought in at any time before judgment, whenever such tribe "can be identified," as set forth in the fifth section of the act. The reasons for this conclusion are fully set forth in the opinion of the Court of Claims in *Duran* v. *United States et al.*, (31 C. Clms. 353.) But we are unable to concur in the conclusions therein reached. In our view, the act provides for a recovery of depredation claims in two classes of cases: the one where the persons, classes of persons, tribe or tribes or band of Indians cannot be identified, in which event the United States may be held liable upon proof complying with other terms of the act, though failing to identify the particular depredators; the other, where the persons or tribe described in the act can be identified, in which event they must be named in the petition, and the judgment will go against the United States and the tribe committing the wrong, to be satisfied primarily out of the funds of the Indians. As was said in the Gorham case, *supra:* "It may be fairly claimed that, reading all the provisions together, the act makes it necessary, when known, to join with the United States the Indians or tribe of Indians by whom the illegal acts are alleged or are supposed to have been committed,"

Whichever form the action takes it must be brought within three years after the passage of the act, as provided by the first section. In requiring the band or tribe of Indians to be described as near as may be, it is the purpose of the act to require such tribe primarily liable for the injury to be brought before the court, when they can be identified for the purpose of the judgment authorized in the fifth section. All the sections are to be read together to effectuate the purpose of the law, and when the tribe "can

be identified" it must be described as near as may be, that is, with reasonable accuracy, sufficiently identifying the party for the purposes of the action and judgment, resorting to the liability of the United States alone only in cases where the offending parties cannot be identified. The claimant under the statute has three years for the purpose of investigating his cause of action, and, in cases where it can be done, identifying the tribe sufficiently for the purposes of pleading and judgment against both the United States and the Indian tribe, or, in the alternative, proceeding against the United States alone. It is true that the act does not in terms provide for service upon the Indian tribes, their agents or attorneys, and the Attorney General is required to appear for them as well as for the United States. Of this provision, Mr. Justice Peckham, speaking for the court in the Gorham case (*supra*) said: "Although the fourth section provides for the defense of the claim by the law officer of the Government under any circumstances, yet as the interest of the Indians is embraced in the inquiry before the court because of their liability to a judgment against them if identified, and to a payment of their judgment out of the annuities or otherwise, as provided in the sixth section, it is proper to allow them to appear and defend also by their own attorney." When brought into court they may give by special counsel more careful attention to their particular defense than could be given by the law officer of the Government charged with the defense of thousands of similar claims. But it is said that the Attorney General, by failing to promptly raise by plea the defense of misjoinder, is quite as much in fault as the petitioner in permitting more than three years to elapse before the new party is brought in, and it is said that at the common law this objection could only be raised by such plea seasonably interposed. At common law, where it was sought to bring in another party jointly liable, a plea by the defendant setting forth the non-joinder, and giving the name of such party, was the proper method of procedure. (3 Chitty on Pleading, [901] and notes.) But such is not the present case. The original petition charged positively that the depredation was committed by the Ute Indians. It was sufficient for the Attorney General to plead the general issue to put the plaintiff upon proof of his allegations. It is said that eleven thousand of these cases have been begun, and it is not to be presumed that the Attorney General would know the facts of each case, and be in possession of information to fulfil the requisite of a good plea and furnish the name of the party to be impleaded. It was for the plaintiff to make such investigation as would warrant the beginning of the action against the proper tribe, or against the United States alone, averring that the particular tribe could not be identified.

It is further insisted that it is the purpose of the act, as provided for in the fifth section, to require the judgment to be rendered against the Indian

tribe if it can be identified at any time before judgment, and that this construction is required to protect the interests of the United States. But we think this section should be read in connection with the other sections of the act, and the manifest purpose is to join in the petition when it can be identified, the tribe by whom the depredation was committed, and to limit the presentation of the claim to three years from the passage of the act. If this be not so the Indians may be made parties to the proceeding and judgment without being brought into court in any manner until years after the alleged wrong was committed, and when it may be impossible, by reason of the lapse of time or the death or disappearance of witnesses, to make adequate defense. The construction herein put upon the statute will give to the three years' limitation the effect of other statutes of limitation and will, in our judgment, best effectuate the purpose of the act. This act is extremely liberal in permitting presentation of claims for Indian depredations. All limitations are swept away except the requirement as to the time of filing the petition. In the present case the depredation is alleged to have been committed eighteen years before the action was commenced. Under these liberal provisions we think it was the purpose of the law to require parties to be duly prosecuted within the three years allowed for the filing of petitions, and the liberality of the act should not be extended by construction. As the case was prosecuted against the wrong tribe until after the three years had expired, it cannot be maintained against the Indians sought to be brought in by the amendment, nor can it be sustained against the United States, which is liable by itself only in cases where the depredating Indians or other persons are unknown.

It follows that the judgment of the Court of Claims must be reversed and the petition directed to be dismissed, and it is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 15.—October Term, 1904.

The United States and The Kiowa Indians, Appellants, *vs.* Juan B. Martinez, Administrator of Julio Martinez, deceased. } Appeal from the Court of Claims.

[December 5, 1904.]

Mr. Justice White, with whom concurs Mr. Justice McKenna, dissenting.

Under the Indian depredation act of March 3, 1891, the United States was sued by one Gorman in the Court of Claims, and it was averred in the petition that the damage complained of had been inflicted by the Comanche and Kiowa tribes of Indians, who were in amity with the United States. After hearing, the Court of Claims, finding it to be established by the proof that the loss complained of had been occasioned by Indians in amity with the United States, but that the proof did not show that the Comanche and Kiowa tribes were the wrongdoers, nevertheless, without any amendment of the petition, rendered a judgment solely against the United States. The action of the Court of Claims was sustained by this court in *United States* v. *Gorham*, (165 U. S. 316.)

In considering the power conferred by the statute it was said (p. 320):

"In conferring jurisdiction in this class of cases upon the Court of Claims, it will be seen that Congress conferred it in regard to all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge. So long as the depredations were committed upon the property of citizens of the United States, and by Indians in amity with the government, without just cause, etc., jurisdiction and authority to inquire into and finally adjudicate upon such claims was granted to the court. This broad ground of jurisdiction would, unless circumscribed by the subsequent provision of the act, permit an adjudication against the United States alone. There is nothing in any other portion of the act which provides in terms for joining as co-defendants with the United States the tribes or bands of Indians by whom the alleged illegal acts were committed. The third section of the act merely provides for the contents of the petition, and by such section it is made the duty of the petitioner to state in his petition 'the persons, classes of persons, tribe or tribes, or band of Indians by

whom the alleged illegal acts were committed, as near as may be,' etc. This is for the obvious purpose of giving some notice to the Government of the alleged facts upon which the claim is based, so that the proper defense, if any exist, may be made to the claim."

Again, after pointing out that the statute made it "the duty of the court to determine in each case, if possible, the tribe of Indians or other persons by whom the wrong was committed, and to render judgment in favor of the claimant or claimants against the United States and against the tribe of Indians committing the wrong, when such can be identified," it was observed (p. 321):

"But the fifth section provides for judgment in favor of claimant and against the United States in any event where the property of a citizen has been destroyed under the circumstances provided in the statute, but only against the tribe of Indians committing the wrong 'when such can be identified,' and of course it follows if they cannot be identified no judgment can go against them. The United States would then be left as alone responsible for the property destroyed, provided the proofs were of the character mentioned in the first section of the act; that is, the claimant would be bound to prove that he was a citizen of the United States at the time of the taking or destruction of his property; that it had been taken by Indians belonging to some band or tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and that it had not been returned or paid for."

To my mind this decision clearly establishes that under the act of Congress the Indian tribe by whom the depredation was committed was not an essential party to give the court jurisdiction over the claim. This conclusion, it seems to me, is inevitable from the ruling that, although it was alleged in the petition that a particular tribe was the wrongdoer, it was competent for the court to conform to the proof and render a judgment against the United States in a case where the proof did not establish the truth of the averment as to the tribe committing the injury, if only it was shown that the wrong complained of must have been committed by some Indian tribe which was in amity with the United States. Now, the question on this record is simply whether a petitioner who has alleged that the wrong was committed by a particular tribe can, after the three years' limitation, amend by stating another and different tribe as the wrongdoer. It is decided that such amendment cannot be allowed, because to allow it would amount to a fatal departure, that is, the substitution of a new and wholly different cause of action.

Consistently with the ruling previously made, my mind cannot assent to this conclusion. To adopt it without specifically overruling the Gorham case, it seems to me, is to declare on the one hand that it is not essential to prove the allegation that the wrong was committed by a particular tribe, and on the other hand to say that the allegation as to the tribe

committing the wrong was essential to the cause of action. That is to declare that a particular allegation is at the same time both essential and non-essential—essential to be alleged, but not essential to be proved.

As it is considered by me that the Gorham case is conclusive of this, and as the opinion now announced does not purport to overrule that case, it is not necessary for me to enter into a statement of my reasons for believing that, even if that case did not exist, the construction now given to the statute is not only repugnant to its text, but conflicts both with the rights of individual claimants and those of the United States, as shown by the purpose and spirit of the act.

I therefore dissent.

True copy.

Test:

Clerk Supreme Court, U. S.